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In the Supreme Court of the United States

October Term, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE

Counsel for Amicus Curiae

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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1471, 76-1521, 76-1595,
76-1604, 76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF JOINT RESPONDENTS

QUESTIONS PRESENTED

Joint Respondents adopt the four Questions Presented on page 3 of the November 17, 1977 Brief of National Association of Broadcasters, Petitioner in No. 76-1595, but submit a fifth Question Presented, as follows:

Whether the Court of Appeals properly held that the Commission's divestiture rule, limited to 16 small-market newspaper-broadcast combinations, was arbitrary, capricious and without record support.

IDENTITY OF RESPONDENTS

Owosso Broadcasting Company, Inc., the licensee of Radio Stations WOAP(AM) and WOAP-FM, Owosso, Michigan, is owned by the Owosso Argus Press Company, which publishes *The Argus-Press*, a daily newspaper in Owosso. Owosso is in central Michigan about

85 miles northwest of Detroit. Its 1970 population is 17,179. *The Argus-Press* was established in 1854. WOAP began operation in 1947, some 30 years ago, and WOAP-FM began operation in 1965.

WJAG, Incorporated is the licensee of Radio Stations WJAG(AM) and WJAG-FM, Norfolk, Nebraska. WJAG, Incorporated is wholly owned by Huse Publishing Company, the publisher of *The Norfolk Daily News*. Norfolk is in northeastern Nebraska and has about 16,000 persons. Huse placed WJAG(AM) on the air 55 years ago, in 1922, as the second radio station in Nebraska. Since WJAG is restricted to daytime-only operation, WJAG sought to provide Norfolk a full-time aural service by requesting a Norfolk FM allocation. WJAG-FM was placed on the air in 1971. Huse has published *The Norfolk Daily News* since 1887.

Daily Telegraph Printing Company ("Daily Telegraph") is the licensee of Stations WHIS(AM), WHAJ (FM) and WHIS-TV, Bluefield, West Virginia, a community of about 16,000. It also publishes *The Bluefield Daily Telegraph*, a daily newspaper. Daily Telegraph has continuously operated WHIS since it was built in 1929. WHAJ was activated in the late 1940's and, after a silent period in the 1950's, has operated since 1963. Daily Telegraph petitioned the Commission to assign Channel 6 to Bluefield as a first area commercial VHF allocation; and it activated WHIS-TV in 1965. It has published *The Bluefield Daily Telegraph* since 1896. Bluefield is the 139th television market according to the American Research Bureau rankings.

The Brockway Company is the licensee of Radio Station WWNY, Watertown, New York, an upstate community of about 30,000, and of WWNY-TV, Channel 7, in nearby Carthage, New York, a community of about 4,000. It publishes *The Watertown Daily Times*, a Watertown daily newspaper. Brockway has operated Station WWNY for over 36 years, having bought it in 1941.

It urged the Commission to assign Channel 7 to Carthage as the first VHF allocation in the Watertown-Carthage area; and it activated WWNY-TV in 1954. *The Watertown Daily Times* has been published for 116 years, of which the past 44 years have been under its present ownership. Watertown is the 163rd ARB television market.

Gray Communications Systems, Inc. owns WALB, Inc., and has for over 23 years been the licensee of Station WALB-TV, Channel 10, Albany, Georgia, a community of about 73,000 persons in southwestern Georgia. It has owned Albany Herald Publishing Co., which publishes *The Albany Herald*, a daily newspaper in Albany, since before 1954 when it activated WALB-TV. Albany is the 138th ARB television market.

STATEMENT OF THE CASE

Until these proceedings, the Commission permitted common ownership of co-located stations in each broadcast service. One could thus own in combination one AM, one FM and one television station in the same community. While there was no prohibition of common ownership in a geographic area, the Commission did examine concentration of ownership on an *ad hoc* basis. Respondents' licenses were all granted and repeatedly renewed during this period.

On March 25, 1970, the Commission's *First Report and Order* in Docket 18110 (22 F.C.C.2d 306, JA 33) adopted rules prohibiting prospective common ownership of co-located VHF television stations and radio stations. These rules did not require divestiture, but provided that upon a sale of co-located, commonly owned VHF television and radio stations, they must be sold to separate parties. These rules did not prohibit common ownership of co-located newspapers and broadcast stations.

Upon issuance of its *First Report and Order*, the Commission released a *Further Notice of Proposed Rule Making* in Docket 18110 (22 F.C.C.2d 339, JA 101) which proposed divestiture, within five years, to reduce one party's holdings in a market to one or more daily newspapers, or one television station, or one AM-FM radio combination. Under the proposal, no grants of new or additional broadcast licenses would be made to owners of co-located daily newspapers. This divestiture proposal drastically departed from the past practice of limiting such rules to prospective effect, and existing local newspaper-broadcast interests strongly opposed the divestiture concept.

By the fall of 1971, all comments on this *Further Notice* were received. No action was taken until February 28, 1974, when a *Memorandum Opinion and Order* was adopted giving interested parties the opportunity to file updated comments on the *Further Notice* and scheduling oral argument, which was held July 24-26, 1974 (JA 127).

On January 28, 1975, the Commission issued its *Second Report and Order* terminating the proceeding in Docket 18110 (50 F.C.C.2d 1046, JA 134). This continued without change the rules governing existing co-located television-radio combinations or AM-FM radio combinations. However, new restrictions on co-located radio-newspaper or television-newspaper combinations were adopted. Divesture was required by January 1, 1980, where the only daily newspaper of general circulation in the community is commonly owned with the only radio station(s) placing a city grade signal over the community during daytime hours. Such divestiture can be effected by the sale of the newspaper or the radio station(s). Where other newspapers or broadcast stations serve the community, co-located newspaper-radio combinations are not required to divest, but if such combinations are sold they must be sold to separate parties. The formation

of new co-located radio-newspaper combinations is forbidden.

These new rules likewise require divestiture by January 1, 1980, where the only daily newspaper of general circulation in the community and the only commercial television station placing a city grade signal over the community are commonly owned, regardless of the number of independently owned radio stations serving the area. This divestiture can be effected by sale of the newspaper or the television station. New co-located television-newspaper combinations are prohibited. These are held to be "co-located" if the Grade A contour of the television station encompasses the community of the newspaper. All other co-located newspaper-television combinations need not divest, but if such combinations are sold, they must be sold to different parties. Waivers of any required radio-newspaper or television-newspaper divestiture would be considered only upon a showing of (1) inability to sell the station; (2) inability to support separate ownership and operation of the newspaper and station; or (3) other reasons why the purposes of the new rules would be disserved by divestiture (Appendix G of *Second Report and Order*, JA 264-66).

Appendix D of the *Second Report and Order* lists seven communities, including Albany, Georgia; Bluefield, West Virginia; and Watertown, New York, as "TV Station Monopolies—Divestiture Required" (JA 242). Appendix E lists nine communities, including Owosso, Michigan, and Norfolk, Nebraska as "AM and FM Station Monopolies—Divestiture Required" (JA 242). Thus, all five respondents are required to divest themselves before 1980 of either their newspapers or their co-located radio or television stations. Of the 16 divestiture communities listed in said Appendices D and E, Albany, Georgia is the largest, with 72,623 persons, and Hope, Arkansas is the smallest, with 8,810 persons (1970 Census). The average population of the 16 communities is 27,182.

Petitions for Reconsideration of these divestiture requirements were filed by the licensees of several of the affected stations. The American Newspaper Publishers Association ("ANPA") also sought reconsideration of the *Second Report and Order*, including its divestiture requirements. On May 28, 1975, the Commission adopted a *Memorandum Opinion and Order* affirming its *Second Report and Order*, including its divestiture provisions, and denying these Petitions for Reconsideration (JA 317).

All five respondents herein sought review of the *Second Report and Order* by the United States Court of Appeals for the District of Columbia Circuit (Case Nos. 75-1152, 75-1379, 75-1387, 75-1614 and 75-1618). They contended, *inter alia*, that the *Second Report and Order's* divestiture rule was arbitrary and capricious in significant respects, and that it was highly discriminatory and without record support to single out a handful of rural-area newspaper-broadcast groups as so "egregious" as to compel divestiture. On March 1, 1977, that court rendered its decision which affirms the prospective rules of the *Second Report and Order*, but vacates such portions thereof as have retroactive effect and deal with existing combinations. The court remanded the record to the Commission for adoption of a rule requiring divestiture of all co-located commonly owned newspaper-broadcast combinations, except those where the evidence clearly discloses that continued cross-ownership is in the public interest (JA 339, 435). In its April 5, 1977 decision on the Commission's motion for stay of the mandate, the court again expressly sustained the above position of respondents, holding that the few stations required to divest had received inconsistent administrative treatment; that the lines drawn between these stations "and all other present co-located combinations were arbitrary and capricious"; and that the treatment accorded the few divestiture cases was invalid "since the record contained no evidence that justified their disparate treatment" (JA 442).

ARGUMENT

I. The Court of Appeals' Invalidation of the FCC's Limited Divestiture Order Was a Lawful Exercise of Its Reviewing Authority and Involved No Improper Substitution of Judicial for Agency Judgment.

The Joint Respondents fully agree with the Commission that the Court of Appeals exceeded the bounds of proper judicial review of agency action when it reversed the Commission's decision to grandfather most existing local newspaper-broadcast combinations. The Commission was well within its statutory and constitutional authority,[1] and otherwise acted properly, in refusing to order divestiture in the absence of tangible public interest harm. In view of the record before the Commission, the agency's carefully articulated balancing of relevant policy considerations, and longstanding judicial approval of grandfathering as an entirely appropriate legislative and administrative practice,[2] it is quite clear that the Court of Appeals unlawfully substituted its judgment for the agency's when it rejected the Commission's choice of presumptions and held that "divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest" (JA 431).

The Court of Appeals' unmistakable preference for divestiture, and its unwarranted downgrading of the significance of the policies which the agency legitimately deemed decisive, gave it no license to usurp the rule making function delegated by Congress to the Commission

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[1] As documented in Briefs of Petitioners ANPA and NAB, there is solid authority for the proposition that the FCC lacks the requisite statutory and constitutional authority to impose *any* restrictions on newspaper ownership of broadcast stations. Under this analysis, which the Joint Respondents expressly support, even the Commission's prospective rules in this proceeding are invalid; *a fortiori*, the Commission was well advised to eschew across-the-board divestiture.

[2] *See, e.g.*, United States v. Maher, 307 U.S. 148, 153 (1939); Buckeye Cablevision v. FCC, 387 F.2d 220, 227-28 (D.C. Cir. 1967).

in this area. "The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem [of deciding whether the public interest will be served] to the latter." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946).

It by no means follows, however, as the Commission erroneously contends (Br. at 39-42), that the Court of Appeals' invalidation of the Commission's highly selective and idiosyncratic divestiture order—by which it required the dissolution by 1980 of 16 small-market newspaper-broadcast combinations—was at all inconsistent with these precepts. Indeed, this Court should view with considerable skepticism the Commission's contention that, in striking down the limited divestiture order, the Court of Appeals again unlawfully substituted its judgment for that of the agency and, what is worse, "rebalanced the scales to suit its own predilictions." FCC Brief at 39. If the Court of Appeals had simply followed its bias in favor of divestiture, it would have been expected to affirm, as a welcome first step, a divestiture ruling aimed at alleged "egregious" instances of media monopoly. That the court instead reversed Commission action conforming to what the court held was remedially required in *all* cases of newspaper-broadcast cross-ownership (except those where waivers are indicated) amply demonstrates that the court eschewed implementing its personal policy preferences when it set aside the limited divestiture order. Any lingering doubt on this score is resolved by the court's explicit observation, *in the nature of an alternate holding*, that "even if the Commission's [rather than its own] chosen presumption were supportable, its

current policy [of ordering divestiture in 16 selected markets] could not stand" (JA 429).

II. The Commission's Limited Divestiture Order Has No Support in the Record.

The limited divestiture order that the Commission defends as a rational exercise in line-drawing was nothing of the sort. As the Court of Appeals correctly held, there was nothing in the record which supported disparate treatment of the 16 affected combinations. The Commission conducted no hearings to enable it to assess actual conditions in the markets in question. Even assuming that individual hearings were unnecessary,[3] the Commissison was unable to point to anything in the written comments to substantiate its conclusion that, in these markets but in no others, the need for divestiture was "overwhelming" and the evidence of an absence of diversity was "unambiguous" (JA 207).

The lack of record support for this conclusion is entirely understandable, for the Commission never gave notice that it was considering a divestiture rule based on a standard of "egregiousness" that was and is highly suspect.[4] In fact, it was not until the rule making was

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[3] This Court, like the court below, need not decide this point (JA 392-93). It is raised simply to illustrate the inadequacy of the record on which the Commission premised its divestiture order.

[4] The Commission defends, as judicially approved, its novel "egregiousness" standard, which it equates with an "effective monopoly of local media" (FCC Br. at 29), by citing this Court's opinion in United States v. Radio Corp. of America, 358 U.S. 334, 351-52 (1959), where it was suggested that the public interest standard might not be met when "the publisher of the sole newspaper in an area applies for *the only available radio and television* facilities which, if granted, would give him a monopoly of that area's major media of mass communication." (emphasis added). The Court's standard is manifestly inapplicable to the situation in Albany, Georgia (to cite one example), where Gray Communications' "monopoly" competes with seven local radio stations and a

completed that the Joint Respondents had any inkling that the Commission had developed an "egregiousness" standard and had proceeded to examine, *in camera*, all known instances of combinations meeting its hitherto secret test (JA 201-09).

Thus, from a purely procedural standpoint, the Commission's limited divestiture rule was gravely flawed. The notice and comment provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, are by no means empty formalities. On the contrary, these requirements are necessary to assist judicial review and to provide fair treatment for persons affected by the rule. *Home Box Office, Inc.* v. *FCC*, —— F.2d ——, —— (D.C. Cir. No. 75-1280, *decided* March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977). To this end, there must be an "*exchange* of views, information and criticism between interested persons and the agency," and consequently, the notice required by the APA "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Id.* The notices issued in the proceedings below were intolerably mute insofar as divestiture standards were concerned and, as a result, the opportunity for an exchange of views and information—so essential for a record upon which an informed judgment could be made—was irretrievably lost.

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cable television system. Thus, the Commission's definition of "effective monopoly" not only differs significantly from the Court's, but is lacking in any empirical justification in the record. *See also* Kuczo v. Western Connecticut Broadcasting Co., —— F.2d —— (2d Cir. No. 77-7111, decided October 27, 1977) (district court finding of media monopoly in Stamford, Conn. which ignored coverage by out-of-town radio stations reversed). The elusive nature of a workable definition of "effective monopoly" underscores the necessity for prior notice of, and an opportunity to comment on, the Commission's proposed standard—basic requirements which the FCC ignored in this proceeding.

III. The Commission's Limited Divestiture Requirement Was Arbitrarily Imposed without Consideration of the Very Factors Which Compelled the Agency to Grandfather Most Existing Newspaper-Broadcast Combinations.

Even if the Commission had not defaulted on its obligation to give notice of its proposals in a sufficiently "concrete and focused form so as to make criticism or formulation of alternatives possible" in advance of its decision,[5] *id.*, its limited divestiture order still could not have withstood judicial scrutiny. While the Commission undeniably has discretion to formulate classifications in rule making, this discretion must be exercised in an informed and rational manner. Here, however, the Commission's limited divestiture rule was grounded more in rhetoric than in the record and reflected distinctions that were palpably arbitrary.

For reasons that remain obscure, the Commission, in derogation of well-settled principles of reasoned decisionmaking, at no time explained why the same weighty public interest objectives that, on balance, led it to grandfather most existing cross-ownerships did not even merit consideration when it came to the 16 small-market

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[5] The Court of Appeals' opinion suggests that among the alternatives to small-market divestiture that might have been usefully explored was the possibility of additional station allocations or "drop-ins." Contrary to the FCC's assertion (Br. at 41), the court's focus on possible alternative remedies was entirely proper in light of the Commission's unconvincing demonstration of need for its limited divestiture rule. The court has admonished that "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). In this connection, it is important to note that the FCC expressly disavowed premising its divestiture rule on a finding of improprieties (JA 211) and, as the court noted, the record before it showed that in at least one of the markets where divestiture was ordered, Meridian, Mississippi, there was service from no less than 109 media outlets (JA 407 n. 80).

combinations singled out for what the Commission itself labels as the "drastic" remedy of divestiture (FCC Br. at 18). Regulatory action of this character, which bears the unmistakable imprint of an arbitrary double standard, is *prima facie* suspect. *Capitol Airways, Inc.* v. *CAB*, 292 F.2d 755, 758 (D.C. Cir. 1961). Long before this case, the Court of Appeals instructed the Commission that it must set forth a rational justification for reaching inconsistent results in similar cases, and it has consistently remanded litigation to the agency "when it did not take pains to reconcile an apparent difference in the treatment accorded litigants circumstanced alike." *Garrett Broadcasting Service* v. *FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (denial of waiver of principal city coverage rule reversed because FCC's Review Board failed to reconcile its action with past decisional practice); *see also Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971) (fairness doctrine ruling reversed as inexplicably inconsistent with prior precedent); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730 (D.C. Cir. 1965) (denial of radio license renewal to producers of fraudulent quiz program reversed in light of contemporaneous action renewing licenses of national television network also connected with the deceptive practices); *Sunbeam Television Corp.* v. *FCC*, 243 F.2d 26 (D.C. Cir. 1957) (case remanded to FCC because of its apparent failure to apply consistent standards in comparative hearing).

Moreover, the court has emphasized that the Commission must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act." *Melody Music* v. *FCC*, *supra*, 345 F.2d at 733. This the Commission failed to do, notwithstanding its hollow assertion before this Court (FCC Br. at 39) that it followed "the classic approach of balancing the relevant public interest considera-

tions." If any such balancing occurred, the Commission managed to keep its reasoning processes a secret not only from the affected parties but from the Court of Appeals as well.

To be sure, the Commission took care to enumerate superficial factual differences between the 16 combinations it made subject to the divestiture requirement and the remaining combinations as to which it found that grandfathering would serve the public interest. For example, in the small television markets involved, the only daily newspaper published in the community apparently owned the only local television station licensed to serve that community with a city grade signal; in the remaining markets, the local newspaper-television combinations received competition from other local daily newspapers and/or other television outlets providing city grade coverage. In the *Second Report and Order*, the Commission explained the pertinence of this distinction as follows:

> "We were greatly concerned about a lack of diversity that reaches a point sufficient to constitute an effective monopoly in the marketplace of ideas as well as economically. This did not mean, for example, that no magazines or other periodicals entered the market, or that no other radio or television station could be received there. Aside from the fact that such media outlets often had only a tiny fraction in the market, they were not given real weight since they often dealt exclusively with regional or national issues and ignored local issues. If they did deal with locally oriented issues, it was their own locality that was the focus. Such a situation does not bespeak a real diversity on vital issues of local concern. In fact, it is local issues on which so much decision making by the electorate is required, and on which the level of diversity provided by incoming media is lowest. Accordingly, we made an effort to determine whether diversity, real community-wide diversity, was present on such topics of local concern." (JA 203).

If the Commission's *exclusive* mandate were to promote diversity of viewpoints on local issues and intermedia competition, there might have been a plausible basis for differentiating between the cross-ownership situation in the 16 affected markets and that in larger cities, assuming for argument's sake the existence of record evidence rationally supporting the distinction the Commission drew. *Cf. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 859-60 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) ("[t]he need for diversity, and the danger of concentration, is not as great in Boston as in smaller markets").[6] But regardless of how one characterizes the Commission's concern for diversity and competition,[7] these statutory objectives are *not* the exclusive factors to be considered in determining whether divestiture would serve the public interest. As the Commission itself recognized, other statutory purposes must necessarily be considered.

Thus, in the *Second Report and Order*, the Commission held that, although it remained convinced of the importance of diversity, this was by no means the only factor to be weighed under the Act's public interest standard. More specifically, it stated:

> "There are a number of public interest consequences which form the basis of our concern. Requiring divestiture could reduce local ownership as well as the involvement of owners in management as many sales would have to be to outside interests. The continuity of operation would be broken as the new owner would lack the long knowledge of the community and would have to begin raw. Local economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too. None of these points was given consideration when we spoke in more sweeping terms at an earlier stage of this proceeding." (JA 197).

[6] The Commission erroneously relies on dicta in *Greater Boston* as upholding its view that smaller rather than larger markets most likely experience a lack of diversity of views (FCC Br. at 41). *Greater Boston*, however, makes clear that diversification is but one of many statutory objectives to be considered by the Commission in carrying out its licensing responsibilities.

[7] The Commission alternately describes these concerns as "primary" and "secondary." Second Report and Order, JA 200. The Court of Appeals has also held that competition in broadcasting is not the exclusive, nor even necessarily the dominant, concern under the Act's public interest standard. Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958).

The Commission went on to say:

> "In our view, stability and continuity of ownership do serve important public purposes. Traditions of service were established and have been continued. Entrance and exit from broadcast ownership by these parties are determined by factors other than just profit maximization. Many began operation long before there was hope of profit and were it not for their efforts service would have been much delayed in many areas. Particularly in connection with a number of entities, there is a long record of service to the public. Under what circumstances then, should such ownership be disturbed? We have concluded that a mere hoped for gain in diversity is not enough. Unlike for prospective rules, divestiture introduces the possibility of disruption for the industry and hardship for individual owners." (JA 197-98).

In deciding to attach decisive weight to such policies as stability, continuity and local ownership, the Commission was on sound legal terrain. Thus, with respect to applications for new stations, the Commission has stated that its licensing process is directed toward *two* basic objectives: diversification of ownership of the mass media and provision of the best practicable service to the public. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). Often these objectives are compatible. At other times, however, a choice be-

tween them must be made, and the Commission has on a number of occasions favored the applicant who held out the promise of providing superior service over an applicant whose attributes in terms of the diversification objective were more attractive. *See, e.g., Farragut Television Corp.*, 5 F.C.C.2d 93 (1966); *Historyland Radio*, 28 F.C.C. 69 (1960); *see also Pinellas Broadcasting Co.* v. *FCC*, 230 F.2d 204 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

Where existing interests have been involved, the Commission's preference for stability and continuity over diversification has been even more pronounced, and has been judicially approved as both rational and within the Commission's authority under the Communications Act. *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, 702 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975). *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971); *Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 858.

For example, in *Greater Boston*, *supra*, the Court of Appeals recognized the legitimate expectancies of license renewal applicants, stating that "such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." Similarly, in *Citizens Communications Center*, *supra*, the court appropriately observed that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." And in *Fidelity*, *supra*, the court held that, on an evenly balanced record, the Commission may properly assign decisive weight to a renewal applicant's past performance, however average or undistinguished.

Here, the Commission found that there was "an undramatic but nonetheless statistically significant superiority in newspaper-owned television stations in a number of program particulars" (*Second Report and Order*, JA

198 n. 26). This evidence amply supported the Commission's decision against an across-the-board divestiture requirement in the case of co-located newspaper-broadcast entities, especially since the idea of divestiture is a distinct departure from the Commission's typical approach of limiting new multiple ownership rules to prospective effect. Having decided, and properly so in view of its past decisional practice and the authorities discussed above, that stability, continuity, avoidance of hardship, and preservation of local ownership are statutory objectives with authentic claims of their own, the Commission could not have plausibily justified a general divestiture requirement.

In view of the Commission's eloquent exposition of the reasons why divestiture would ill serve the public interest, one would have expected it to provide a cogent explanation of why the same *balance* of policy considerations did not mandate grandfathered treatment of *all* existing local newspaper-television combinations. Yet, as previously observed, when it came to its discussion of why divestiture was required in 16 instances, the Commission did little more than resort to superficial factual distinctions. Moreover, it evidently proceeded on the assumption that diversification was the sole relevant criterion, even though it had resolutely stated elsewhere in its decision that it would be inappropriate to focus on that "abstract goal alone." (JA 197).

Like the Court of Appeals, this Court can search the *Second Report and Order* in vain for any indication that the Commission found, on balance, that the need for diversity in the 16 affected markets truly outweighed the need for stability and continuity of ownership. While the Commission's Brief asserts (at 39) that the agency found that the public would be harmed if these "egregious" situations were not broken up, its *Second Report and Order* is careful to disavow predicating its divestiture ruling on the existence of improprieties, of which

there was no evidence whatsoever (JA 211). It would thus appear that if the Commission did, in fact, engage in a balancing process, it did so *sub silentio*, contrary to fundamental requirements of reasoned decisionmaking. *See Greater Boston Television Corp.* v. *FCC*, *supra*, 444 F.2d at 851. If, on the other hand, the Commission deemed the policies which supported grandfathering inapplicable in the case of the "egregious" 16, it had a duty to say so and to explain why its resort to inconsistent decisional standards was not arbitrary.

This Court must know what a decision means before it becomes its duty to say whether it is right or wrong. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654 (1954). Too much is at stake in this proceeding to make guesswork on the Court's part permissible. *Radio Station KFH Co.* v. *FCC*, 247 F.2d 570 (D.C. Cir. 1957). As the Court of Appeals correctly held (JA 429-30), the differences between the numerous local newspaper-broadcast combinations accorded grandfathered treatment and the 16 singled out for divestiture are not so obvious—measured either in terms of diversity or in terms of hardship, stability or continuity of local ownership—as to excuse the Commission's failure to explain its inconsistent actions in the manner required by directly apposite judicial authority. *Melody Music, Inc.* v. *FCC*, *supra*.

In the absence of a more complete record, the Commission could not possibly have found that the need for stability and continuity in the 16 affected markets was outweighed by the need for increased diversity, let alone that the balance of policy considerations "overwhelmingly" required divestiture. Indeed, the very considerations which prompted the Commission to grandfather most existing combinations *may apply with even greater force, and may be even more compelling or persuasive*, in the smaller markets where divestiture was so callously

ordered.[8] Certainly, if the Commission thought otherwise, it had a duty to say so and to explain its reasoning.

In short, the Court of Appeals properly concluded that the limited divestiture rule could not be sustained under the tests laid down in *Melody Music* and related cases. The Commission's line-drawing exercise was indefensibly arbitrary, in view of its failure to explain the relevance of its distinction between markets like Watertown, New York or Albany, Georgia, and other larger centers of communications in terms of the *complete package* of statutory objectives and varied licensing goals it said it would (and generally did) consider in deciding the divestiture question.

Where, as here, the Commission itself recognizes that diversity is not the only point to consider, where it articulates the additional factors that are essential to an informed decision on divestiture, and where it then proceeds to ignore these same factors when decreeing the drastic remedy of divestiture in 16 miniscule markets in which no abuses were found, its action cannot be defended as a rational exercise of discretion. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971) (reviewing court must consider, as the Court of Appeals did here, whether the administrative decision was based on a consideration of all relevant factors and whether there has been a clear error of judgment).

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[8] As shown in the introduction, each of the Joint Respondents has deep local roots, and none publishes a daily newspaper outside of the area it is licensed to serve with its broadcast station(s). For these small-market combinations, "swapping" of broadcast facilities with other affected publishers may not be a feasible or possible means of avoiding the hardship and economic dislocation that would accompany uprooting of long-established local ownership and service through forced divestiture (*See* Second Report and Order, separate statement of Commissioner Robinson, JA 305).

CONCLUSION

Insofar as it vacated the FCC's limited divestiture rule, the judgment of the Court of Appeals should be affirmed; in all other respects, it should be reversed.

Respectfully submitted,

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